

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

LIBERTY MUTUAL INSURANCE  
COMPANY,  
Plaintiff,

v.

THE BLACK & DECKER CORPORATION,  
BLACK & DECKER, INC.,  
BLACK & DECKER (U.S.) INC.,  
EMHART CORPORATION, and  
EMHART, INC.,  
Defendants.

CIVIL ACTION No.  
04-10666-DPW  
[Jaffrey Sanitary Landfill Site]

LIBERTY MUTUAL INSURANCE COMPANY'S  
RESPONSE TO DEFENDANTS' MOTION  
TO SUPPLEMENT AND CERTIFY RECORD

Liberty Mutual Insurance Company ("Liberty Mutual") responds to the December 14, 2004 Motion to Supplement and Certify Record filed by defendants, The Black & Decker Corporation, et al. ("Black & Decker"), as follows. Without stipulating to the relevance of any document to the issues raised on appeal, Liberty Mutual assents to Black & Decker's Motion, on the condition that the record which is to be certified and forwarded to the Court of Appeals for the First Circuit be further supplemented by the addition of the following documents from the case styled Liberty Mutual Insurance Company v. The Black & Decker Corporation, et al., C.A. No. 96-10804-DPW (the "1996 Action"):

Date Filed	Docket #	Docket Text
07/22/1996	8	Rule 16.1 Certification filed by Liberty Mutual Ins. (mqc) (Entered: 07/23/1996)
02/09/1998	139	List of appendices submitted in support of Liberty Mutual's motion and supporting memorandum for

		summary judgment, together with Appendix/exhibits submitted by Liberty Mutual in support of its Motion for Summary Judgment: Binders 7, 8, 26, and 28
03/02/1998	148-150	Appendix/exhibits submitted by Black & Decker in support of summary judgment: Volume LXXXIX
03/02/1998	151	List of Appendix/exhibits by Liberty Mutual Ins. in support of [144-1] opposition response, together with Appendix/exhibits submitted by Liberty Mutual in support of its opposition to Black & Decker's Motion for Partial Summary Judgment: Binders 7, 8, 26, and 28 (as submitted on 02/09/1998)
07/24/2002	271	Joint supplemental submission in Response to [266-1] order by Liberty Mutual Ins., Black & Decker, Black & Decker, Inc., Black & Decker (U.S.), filed. c/s (mr) (Entered: 07/25/2002)
08/15/2002		Revised Joint supplemental submission in Response to [266-1] order by Liberty Mutual Ins., Black & Decker, Black & Decker, Inc., Black & Decker (U.S.)
09/27/2002	279	Submission by Liberty Mutual Ins. re: [140-1] motion for partial summary judgment, [138-1] motion for summary judgment, filed. c/s (mr) (Entered: 09/27/02)
09/27/2002	285	Exhibit Volume F by Liberty Mutual Ins. to [279-1] submission re: motion for partial summary judgment, [138-1] motion for summary judgment (mr) (Entered: 09/27/2002)
09/17/2003		Electronic Clerk's Notes for proceedings held before Judge Douglas P. Woodlock: Hearing on Cross/Jaffrey site (in connection with Summary Judgment) held on 9/17/2003. Taken under advisement. Hearing on 10/18/03 set on the Bostik-Middleton site as previously set. (Court Reporter Pam Owens.) (Greenberg, Rebecca) (Entered: 09/17/2003)
01/07/2004	391	MOTION in Limine re: Black & Decker's burden of proof concerning an "accident" under the 1956 to 1969 USM policies by Liberty Mutual Insurance Company (Rynne, Michelle)(Entered: 01/09/2004)
01/13/2004	393	TRANSCRIPT of Hearing – Jaffrey/Cross Site held on September 17, 2003 before Judge Woodlock. Court Reporter: Pamela R. Owens. The original transcripts are maintained in the case file in the Clerk's Office. Copies may be obtained by contacting the court reporter at 617/443-0008 or the Clerk's Office (Scalfani, Deborah)(Entered: 01/13/2004)
01/20/04	433	STIPULATION ( <i>re PCI Policies</i> ) by Black & Decker (U.S.), Inc. and Liberty Mutual Insurance Company

		(Bennett, Richard) Modified on 1/21/2004 (Rynne, Michelle) (Entered: 01/20/2004)
01/21/04	436	Emergency Opposition to <u>391</u> MOTION in Limine filed by Liberty Mutual Insurance Company. (Rowan, Janice) (Entered: 01/21/2004)
08/25/2004	544	Judge Douglas P. Woodlock: ORDER entered MEMORANDUM AND ORDER, Liberty Mutual's motion for judgment as a matter of law or partial new trial (Doc. 492) is DENIED. Black & Decker's motion for judgment as a matter of law (Doc. 500) is DENIED. Liberty Mutual's motion to establish the amount of reimbursable defense costs (Doc. 502) is DENIED to the extent that it seeks to exclude, as a matter of law, money spent before November 3, 1994, other than those fees and expenses attributable to DEP's cleanup order at Bostik Middleton; DENIED to the extent that it seeks to establish that prejudgment interest is not available; DENIED to the extent that it seeks to establish that Legalgard's standards for attorney's fees should govern defense costs billed after November 3, 1994; and GRANTED to the extent that it seeks to establish that the standards for attorney's fees that it applied before November 3, 1994 should apply to defense costs incurred before November 3, 1994. Liberty Mutual's motion to establish limits on damages payable (Doc. 505) is DENIED to the extent that it seeks to establish that the deemer clause bars coverage; DENIED to the extent that it seeks to establish pro rata allocation among policies; DENIED without prejudice to the extent that it seeks to establish that the "non-cumulation of liability" clause applies; and GRANTED to the extent that it seeks to establish that Liberty Mutual is entitled to a reduction in damages equal to the amount, if any, of the Aetna settlement that can be fairly attributed to indemnification for the Bostik Middleton and/or Whitman sites. Liberty Mutual's motion to prohibit Black & Decker from recouping attorney's fees in the declaratory judgment action (Doc. 509) is DENIED to the extent that it seeks to establish that fees attributable to establishing the duty to defend may not be recovered; and GRANTED to the extent that it seeks to establish that fees attributable to establishing the duty to indemnify or to establishing lost policies may not be recovered. Black & Decker's motion for attorney's fees in the declaratory judgment action (Doc. 507) is GRANTED to the extent that it seeks to establish that

		fees attributable to establishing the duty to defend may be recovered; and DENIED to the extent that it seeks to establish that fees attributable to establishing the duty to indemnify or to establishing lost policies may be recovered. Liberty Mutual's motion to prohibit Black & Decker from recouping attorney's fees in the declaratory judgment action (Doc. 509) is DENIED as moot in light of my ruling on Black & Decker's motion for attorney's fees in the declaratory judgment action. (Rynne, Michelle)(Entered: 08/25/2004)
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Liberty Mutual reserves the right to contest the relevance of any document in the supplemental record to the issues on appeal in this case.

Liberty Mutual is prepared to assist the Court and the staff of the Clerk's Office in preparing and assembling this supplemental record.

WHEREFORE, Liberty Mutual respectfully requests that this Court supplement the record in this action by adding the above-listed documents to a supplemental record comprised of these documents and the documents specified in Black & Decker's December 14, 2004 Motion, and certifying and forwarding same to the Court of Appeals for the First Circuit.

Respectfully submitted,

LIBERTY MUTUAL INSURANCE COMPANY

By its attorneys,

/s/ Ralph T. Lepore, III

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Janice Kelley Rowan (BBO #265520)  
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Dated: December 27, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of December, 2004, I caused a copy of the foregoing document to be served by hand upon Jack R. Pirozzolo, Esq., counsel to Black & Decker, at Willcox, Pirozzolo & McCarthy, P.C., 50 Federal Street, Boston, Massachusetts 02110.

/s/ Janice Kelley Rowan

Janice Kelley Rowan

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